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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,)	No. CR 10-0859 RS
)	
Plaintiff,)	MOTION IN LIMINE TO EXCLUDE
)	PRIOR CONSISTENT STATEMENTS BY
v.)	ALLEGED VICTIM
)	
GARY HARDEMAN,)	Honorable Richard Seeborg
)	July 10, 2013
Defendant.)	2:00 p.m.

INTRODUCTION

Defendant Gary Hardeman will in all likelihood be impeaching the alleged victim in this case with prior statements that are inconsistent with her expected testimony at trial. The natural inclination may be to permit the government to rehabilitate her with prior consistent statements. However, the evidentiary rules regarding prior consistent statements and prior inconsistent statements are not mirror images of one another. On the contrary, the requirements for admitting a prior consistent statement are much more stringent than those for admitting a prior inconsistent statement. Accordingly, the Court should exclude such prior consistent statements that do meet the requirements under the applicable rule.

ARGUMENT

A witness who testifies at trial may be impeached with a prior inconsistent statement or omission. *See, e.g., United States v. Adamson*, 291 F.3d 606, 612 (9th Cir. 2002). There are two federal evidentiary rules addressing such prior inconsistent statements. Rule 801(d)(1)(A)

LIM. EXCLUDE CONSISTENT STATEMENTS

1 defines as non-hearsay a witness's prior statement that is "inconsistent with the declarant's
 2 testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a
 3 deposition." Fed. R. Evid. 801(d)(1)(A). Rule 613 more broadly addresses the admission of
 4 prior inconsistent statements not meeting the requirements of Rule 801(d)(1)(A), including the
 5 admission of extrinsic evidence of the prior statement. *See* Fed. R. 613. Rule 613 authorizes the
 6 introduction of prior inconsistent statements that are not admissible for the truth of the matter
 7 asserted, but rather to "raise the suggestion that if a witness makes inconsistent statements, then
 8 his entire testimony may not be credible." *Adamson*, 291 F.3d at 612.

9 Prior *consistent* statements, by contrast, are only admissible under the provisions of Rule
 10 801(d)(1)(B), which defines as non-hearsay a witness's prior statement that "is consistent with
 11 the declarant's testimony and is offered to rebut an express or implied charge that the declarant
 12 recently fabricated it or acted from a recent improper influence or motive in so testifying." Fed.
 13 R. Evid. 801(d)(1)(B). Focusing on the word "recent," the Supreme Court has held that, even
 14 where there is an express or implied charge that the declarant did fabricate the testimony or act
 15 from an improper motive or influence, a prior consistent statement is not admissible at trial under
 16 Rule 801(d)(1)(B) unless the prior consistent statement was "made before the alleged
 17 fabrication, influence, or motive came into being." *Tome v. United States*, 513 U.S. 150, 156
 18 (1995); *see also id.* (applying to Rule 801(d)(1)(B) the common law temporal requirement that
 19 the "prior consistent statement has not relevancy to refute the charge unless the consistent
 20 statement was made before the source of the bias, interest, influence or incapacity originated")
 21 (citation and internal quotation marks omitted).¹

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 24 ¹ The Supreme Court in *Tome* reversed the defendant's conviction for aggravated sexual
 25 abuse of his daughter on the grounds that the trial court improperly admitted prior consistent
 26 statements by the alleged victim in that case. *See id.* at 167. In doing so, the *Tome* Court
 27 specifically cautioned: "Courts must be sensitive to the difficulties attendant upon the
 28 prosecution of alleged child abusers. In almost all cases a youth is the prosecution's only
 eyewitness. But this Court cannot alter evidentiary rules merely because litigants might prefer
 different rules in a particular class of cases." *Id.* at 166 (citation and internal quotation marks
 omitted).

1 Here, the defense will be charging that the alleged victim's motive to fabricate
2 commenced with her first interview at the U.S. Embassy in Mexico City on December 17, 2007,
3 in which she was suggestively asked the leading question of whether Mr. Hardeman had ever
4 tried to have sex with her during the time she stayed with him in his hotel room, and she said that
5 he did try but that no actual sexual contact ever occurred. *See* Declaration of Daniel P. Blank
6 (filed concurrently with this memorandum) [hereinafter "Blank Decl."] ¶ 2. The alleged victim
7 stuck to this story, with some variations, until August 2010 when she was prepared by the case
8 agent to testify before the Grand Jury and for the first time claimed that Mr. Hardeman had
9 forcibly raped her. *See id.* Thus, under the terms of Rule 801(d)(1)(B) as interpreted by *Tome*,
10 any consistent statements from August 2010 would not be admissible at trial, notwithstanding
11 the impeachment with prior inconsistent statements, because they occurred after the "alleged
12 fabrication, influence, or motive came into being."

13 CONCLUSION

14 For the aforementioned reasons, the Court should under Rule 801(d)(1)(B) all exclude
15 prior consistent statements that post-date the commencement of the charged fabrication.

16 Dated: June 26, 2013

17 Respectfully submitted,

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20 /s/

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